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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS SEPULVEDA, Defendant and Appellant.	G051109 (Super. Ct. No. 12NF0846) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Michael Metaxas for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew Mestman and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesus Sepulveda was sentenced to life in prison without parole for committing first degree murder for the benefit of a criminal street gang. On appeal, he contends: 1) The trial court should have granted him a new trial due to juror misconduct; 2) the trial court provided an inadequate response to a question the jury asked during deliberations; and 3) the verdict is inconsistent in that his codefendant Javier Lopez was only convicted of manslaughter. Finding these contentions unmeritorious, we affirm the judgment.

FACTS

On the night of March 16, 2012, Juan "Lefty" Morales and his roommate Angel Bravo went out drinking to celebrate Morales' birthday.[1] When they got home, Morales started playing around with an ax outside their apartment. Morales took a few whacks at a tree with the ax, but at Bravo's urging he promptly returned the tool to their apartment. Morales then rejoined Bravo outside, where they were confronted by appellant, Lopez and two other members of the Westside Anaheim gang.

During the encounter, appellant announced, "This is Westside" and asked Morales where he was from. Morales said "we live here," "fuck Westside." In response, appellant pulled a gun and shot Morales in the chest. Appellant and his cohorts then pummeled Morales and Bravo before fleeing the scene. Bravo called 911, but Morales died before help arrived.

Testifying on his own behalf, appellant claimed Morales still had the ax in his hands at the time he and Lopez confronted him. Appellant was perturbed Morales was outside with an ax in the middle of the night. Then he realized Morales was missing part of his arm and decided he did not want to fight him. However, during the dispute, Morales began walking toward him with the ax. Fearing for his life, appellant pulled his gun and shot him.

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1 Morales was nicknamed Lefty because he was born with only part of his left arm.

Appellant and Lopez were both charged with first degree murder. The prosecution theorized appellant acted with premeditation and deliberation in shooting Morales. With respect to Lopez, the prosecution theory was that he either aided and abetted Morales in committing premeditated murder, or the offense was a natural and probable consequence of their targeted crime of unlawful fighting. In addition to instructing on these theories, the trial court provided the jury with instructions on second degree murder, heat of passion and imperfect self-defense manslaughter, and perfect self-defense. The jury ultimately convicted appellant of first degree murder and Lopez of manslaughter. It also convicted defendants of street terrorism and found various gang and firearm allegations to be true.

DISCUSSION

New Trial Motion

Following the verdict, appellant moved for a new trial on the basis of juror misconduct. He contends the trial court should have granted his motion or at least conducted an evidentiary hearing on the issue. We find the trial court properly exercised its discretion in denying appellant's motion on its face.

Appellant's motion was based on a declaration from Lopez's attorney. According to the declaration, the defense team questioned one of the jurors following the verdict. After the juror gave his impressions about the case, he was asked, "What about the axe? What about self-defense?" In response, the juror replied, "We weren't sure about that." At the motion hearing, appellant argued the juror's response indicated the jury either did not understand the prosecution had the burden to disprove self-defense beyond a reasonable doubt, or the jury deliberately failed to follow the court's instructions in that regard. Either way, appellant contended, he was entitled to a new trial, or at least an evidentiary hearing to determine whether any jury misconduct occurred.

The trial judge disagreed. In denying appellant's motion for a new trial, he determined the juror's response – "We weren't sure about that" – was "susceptible to many possible interpretations. It could be we weren't sure there was an ax. We had no reasonable doubt about the People's case. It could mean a lot of things. But if we're going to take a casual comment to a losing party after a highly contested case, and have that be grounds for a new trial, we would be changing California law substantially." As for appellant's request for an evidentiary hearing, the judge felt that would be putting the cart before the horse because there was "not . . . any evidence of misconduct here."

The trial judge's ruling was correct. Under California law, "A losing defendant may be entitled to a new trial '[w]hen the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented[.]' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 316.) However, "'a verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror "felt" or how he understood the trial court's instructions is not competent.'" (*People v. Morris* (1991) 53 Cal.3d 152, 231, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see also Evid. Code, § 1150.)

Here, the alleged statement that the jury was not "sure" about the ax or the issue of self-defense was insufficient to impeach the verdict. Not only was the statement based on an inadmissible hearsay (*People v. Williams* (1988) 45 Cal.3d 1268, 1318-1319), it constituted an impermissible attempt to impugn the subjective processes by which the jury decided the case. (See *People v. Lewis* (2001) 26 Cal.4th 334, 389 [no evidence can be used to substantiate a claim of juror misconduct if it reflects a juror's "reasons for his or her vote" or "their decision making processes"]; *People v. Elkins* (1981) 123 Cal.App.3d 632, 838 [alleged misinterpretation of jury instructions is not a permissible basis for claim of juror misconduct].)

More fundamentally, the purported statement was simply too fleeting and ambiguous to support a finding the jury engaged in any sort of prejudicial misconduct. A

juror challenged about the verdict after a trial can be expected to be conciliatory and evasive. It takes more than an inartful response to justify a hearing. The trial court did not abuse its discretion in denying appellant's motion for a new trial or failing to conduct further inquiry into the issue. (See *People v. Hedgecock* (1990) 51 Cal.3d 395 419 [an evidentiary hearing is required "only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred"].)

Response to Jury's Question

Appellant also contends the trial court inadequately responded to a question the jury posed during deliberations. Again, we disagree.

On the second day of its deliberations, the jury sent the trial court a note that read, "Is the difference between first degree and second degree murder by an active, known gang member, premeditation? Or if not, what specifically is the difference?" After discussing the question with counsel, the court told the jury, "The legal definition of first degree murder is contained in CALCRIM instruction 521 on pages 49 and 50. [¶] Please read over this instruction and see if it answers your question. If it does not, please rephrase the question." All of the parties agreed this was an acceptable response to the jury's question.

In a one paragraph argument, appellant contends the note implied the jury incorrectly believed it could convict him of first degree murder simply because he committed a killing as a gang member. While recognizing his attorney agreed to the trial court's response to the note, appellant contends the court had a sua sponte duty to clarify the jury's confusion as to this issue. Alternatively, appellant maintains his attorney was ineffective for failing to request a clarifying instruction.

Appellant does not, however, offer any suggestions as to how he thinks the court should have answered the jury's question, which is telling. We believe the court's response was wholly sufficient. It directed the jury to CALCRIM No. 521, which explained that first degree murder requires proof of premeditation and that unless the

prosecution proves premeditation beyond a reasonable doubt, the murder is second degree murder. Since the jury's note sought clarification of the difference between first and second degree murder, this instruction was directly and accurately responsive.

True, the jury's note referred to "murder by an active, known gang member." But there is nothing in the note suggesting the jury was laboring under the mistaken impression that *any* killing by an active, known gang member constitutes first degree murder. To the contrary, the jury's question focused on the concept of premeditation; the jury simply wanted to know whether premeditation was the distinguishing factor between first and second degree murder. As explained above, the court properly directed the jury to the one instruction that answered that question, CALCRIM No. 521. The court also told the jurors to rephrase their question if CALCRIM No. 521 proved to be unhelpful to them. Since no further questions were forthcoming, it is reasonable to infer the jury found CALCRIM No. 521 enlightening with respect to its initial question. No cause for reversal has been shown.

Consistency of the Verdict

Lastly, appellant contends his murder conviction should be reduced to manslaughter because that is the offense Lopez was convicted of. His argument appears to be based on the assumption that all defendants who act in concert are equally culpable in the eyes of the law. That is not the case. "'[A]lthough joint participants in a crime are tied to a "single and common *actus reus,*" "the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well."' [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118-1119.)

In this case, the jury could reasonably have found appellant, the shooter, harbored the requisite intent for first degree murder while Lopez's culpability was mitigated due to circumstances unique to him, such as lack of malice, heat of passion or imperfect self-defense. That would logically explain the variance in their verdicts. (See

generally *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164 [an aider and abettor may be less culpable than the perpetrator].)

But even if the variance were inexplicable from a factual perspective, that would not constitute grounds for reversal. As our Supreme Court has explained, "The law generally accepts inconsistent verdicts [as between codefendants] as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence." (*People v. Palmer* (2001) 24 Cal.4th 856, 860.) Thus, it matters not that appellant was convicted of a greater offense than his codefendant Lopez.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.